In the Supreme Court

OF THE

UNITED STATES.

W. W. MONTAGUE AND COMPANY (a corporation), et al.,

Plaintiffs in Error,

vs.

EDWARD S. LOWRY AND JAMES J. DALY, partners trading as Lowry & DALY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action prosecuted in the Circuit Court of the Ninth Circuit for the Northern District of California, by these defendants in error, under the provisions of the Act of July 2, 1890 (26 St. L., 209, C. 647), commonly known as the "Sherman Anti-Trust Act," against these plaintiffs in error, who

were members of a voluntary association known as the "Tile, Mantel and Grate Association of California," composed of dealers in tile, in San Francisco, and its neighboring cities, and several manufacturers, residing and doing business without the State of California.

The provisions of the constitution and by-laws (Trans., pp. 47-52) of that association, so far as they are material to this argument, are as follows:

"The objects for which this association is formed "are: To unite all *acceptable* dealers in tiles, fire-"place fixtures, and mantels in San Francisco and "vicinity (within a radius of two hundred miles), "and all American manufacturers of tiles," etc.

"Any individual, corporation, or firm engaged or "contemplating engaging in the tile, mantel, and "grate business in San Francisco, or within a radius "of two hundred miles thereof (not manufacturers), "*having an established business and carrying not less* "*than $3000 worth of stock, and having been pro-*"*posed by a member in good standing and elected,* "shall, after having signed the constitution and by-"laws governing said association, and upon the pay-"ment of an entrance fee, as hereinafter provided, "enjoy all the privileges of membership."

"All associated and individual manufacturers of "tiles and fire-place fixtures through the United "States may become non-resident members of this

"association upon the payment of an entrance fee, "as hereinafter provided, and after having signed "the constitution and by-laws governing said asso- "ciation."

"The initiation fee of this association shall be, for "active members twenty-five dollars, and for non- "resident members ten dollars, which amounts must "accompany each application for membership."

"Each active member of the association shall pay "ten dollars per year as dues, payable in advance on "the third Monday in August of each year. No "dues shall be charged against non-resident mem- "bers."

"No dealer and active member of this association "shall purchase, directly or indirectly, any tile or "fire-place fixtures from any manufacturer or resi- "dent or traveling agent of any manufacturer *not a* "*member of this association*, neither shall they sell "or dispose of, directly or indirectly, any unset tile "*for less than list prices* to any person or persons *not* "*a member of this association,* under penalty of ex- "pulsion from the association."

"Manufacturers of tile or fire-place fixtures or "resident or traveling agents of manufacturers sell- "ing or disposing, directly or indirectly, their prod- "ucts or wares to any person or persons not members "of the Tile, Mantel and Grate Association of Cal- "ifornia shall forfeit their membership in the as- "sociation."

The list prices referred to in the constitution are maximum prices from which many discounts were allowed to members of the association amounting on a cash transaction to 59¾ per cent (Trans., pp. 55, 60, 61, 72).

The following manufacturers, resident and conducting business without the State of California, were members of the association: Columbia Encaustic Tile Works of Anderson, Indiana; United States Encaustic Tile Works; Cambridge Tile Company of Covington, Kentucky; American Encaustic Tile Company of New York City; Star Encaustic Tile Company of Pittsburg, Pennsylvania; Trent Tile Company of Trenton, New Jersey; Maw and Company of England, having offices in Chicago; Providential Tile Works of Trenton, New Jersey, and Ohio Foundry Company (Trans., p. 52).

Lowry & Daly, the defendants in error, were carrying on the business of selling and setting tiles, mantels and grates in the city of San Francisco, and were not members of the association. Prior to the month of August, 1898, when the association was formed, they purchased practically all the tile used by them in their business from the Columbia Encaustic Tile Works. At this time they were in active competition with the other local dealers who subsequently joined the association (Trans., p. 54).

Upon the 23d day of August, 1898, the Columbia

Company wrote to Lowry & Daly advising them of the formation of the association, and notifying them that unless they were members thereof they, the company, could fill none of their orders transmitted after the receipt of the letter. Subsequently they refused to fill orders sent by Lowry & Daly upon the sole ground that they were not members of the association (Trans., pp. 57-59).

After this refusal Lowry & Daly made an effort to secure the tile necessary in their business, from the Eastern manufacturers, through one C. H. Clarke, who at one time had been the local agent of the Columbia Company, and at this time was acting as a commission merchant or broker. He wrote to the Cambridge Tile Manufacturing Company, the United States Encaustic Tile Company, and the Star Encaustic Tile Company, asking each if they would sell to customers of his not members of the association, and from all he received the same reply: that they could not sell outside the association; the Star Encaustic Tile Company referring him to the local dealers. Other manufacturers made no reply to his letters (Trans., pp. 62-65).

After the formation of the association Lowry & Daly were compelled to purchase the tile necessary to their business, from local association dealers at factory list prices—that is, without any discounts (Trans., pp. 60 and 61).

It was admitted on the trial by counsel for the defendants that "the members of this association, these "manufacturers, would not do business that was the "general purpose of the association, with the dealers "who were not members of the association" (Trans., p. 60).

The bill of exceptions recites: "Further testimony "was introduced from which it appeared that be- "tween the month of July, 1898, and the month of "January, 1899, by reason of the fact that certain "manufacturers of tile above mentioned, whose fac- "tories and place of business was out of the State of "California, but within the United States, declined "and refused to sell unset tiles to plaintiffs, whose "place of business was within the State of Califor- "nia, because such manufacturers were and the "plaintiffs were not members of the Tile, Mantel "and Grate Association of California, plaintiffs "were damaged in the sum of five hundred dollars" (Trans., p. 71).

The action was tried by a jury which found a verdict for the plaintiffs for five hundred dollars. Upon plaintiffs' motion an order was made for the entry of judgment for three times the amount of the verdict and for seven hundred and fifty dollars counsel fees (Trans., p. 87). Judgment was entered pursuant to the order (Trans., p. 88). Subsequently the defendants prosecuted a writ of error to the Circuit

Court of Appeals for the Ninth Circuit (Trans., p. 99), and upon the hearing thereof the judgment of the Circuit Court was affirmed (Trans., p. 110).

BRIEF OF ARGUMENT.

The Tile, Mantel and Grate Association of California is a combination declared to be illegal by the Act of July 2, 1890, for it is in restraint of trade or commerce among the several States, and was formed to and does monopolize such trade or commerce.

The Act in part provides as follows:

"Section 1. Every contract, combination in the "form of trust or otherwise, or conspiracy, in re- "straint of trade or commerce among the several "States, or with foreign nations, is hereby declared "to be illegal. Every person who shall make any "such contract or engage in such combination or "conspiracy, shall be deemed guilty of a misde- "meanor. * * *

"Sec. 2. Every person who shall monopolize, or "attempt to monopolize, or combine or conspire "with any other person or persons, to monopolize "any part of the trade or commerce among the sev- "eral States, or with foreign nations, shall be deemed "guilty of a misdemeanor. * * *

"Sec. 7. Any person who shall be injured in his

" business or property by any other person or corpo-
" ration by reason of anything forbidden or declared
" to be unlawful by this Act, may sue therefor in any
" Circuit Court of the United States in the district in
" which the defendant resides or is found, without
" respect to the amount in controversy, and shall re-
" cover threefold the damages by him sustained, and
" the costs of suit, including a reasonable attorney's
" fee."

This enactment of the National Legislature was designed to solve an economic problem, which industrial combination had produced, and to maintain an economic condition of free competition, which the spirit of our laws has always jealously guarded. Its object is dual: to protect the individualism of the producer and dealer, and to insure, for the benefit of the consumer, that values shall be normally regulated by the law of supply and demand, and shall not be enhanced by convention and the artificial stimulus of combination.

Its protection and remedy is extended to three classes of persons: the manufacturer, the middleman and the consumer. And these three classes again resolve themselves into two: vendors, the manufacturers and jobbers; purchasers, the jobbers and consumers. For the protection of the vendor class and to insure that neither the manufacturer nor the jobber shall be forced out of business and deprived

of his livelihood by a combination of commercial rivals, or be compelled to merge his independence and individuality in a combination in no manner subject to his control, the first section of the law was enacted making contracts, combinations and conspiracies in restraint of trade illegal. For the protection of the purchaser class and to insure that free and unhampered competition, which economists recognize as the only means of securing normal and natural values, the second section was enacted, making absolute or partial monopolies illegal.

That such is the purpose of the Act has been recognized by this Court, which say, in *United States* vs. *Trans-Missouri Freight Association* (166 U. S., 290, 323): "In business or trading combinations they may "even temporarily, or perhaps permanently, reduce "the price of the article traded in or manufactured, "by reducing the expense inseparable from the run- "ning of many different companies for the same pur- "pose. *Trade or commerce under these circum- "stances may nevertheless be badly and unfortun- "ately restrained by driving out of business the small "dealers and worthy men whose lives have been "spent therein, and who might be unable to readjust "themselves to their altered surroundings. Mere "reduction in the price of the commodity dealt in "might be dearly paid for by the ruin of such a class, "and the absorption of control over one commodity "by an all-powerful combination of capital.* In any

" great and extended change in the manner or meth-
" od of doing business it seems to be an inevitable
" necessity that distress and, perhaps, ruin shall be
" its accompaniment in regard to some of those who
" were engaged in the old methods. * * * It is
" a misfortune, but yet in such cases it seems to be
" the inevitable accompaniment of change and im-
" provement.

" It is wholly different, however, when such
" changes are effected by combinations of capital,
" whose purpose in combining is to control the pro-
" duction or manufacture of any particular article in
" the market, *and by such control dictate the price at*
" *which the article shall be sold,* the effect being to
" drive out of business all the small dealers in the
" commodity, *and to render the public subject to*
" *the decision of the combination as to what price*
" *shall be paid for the article.* In this light it is not
" material that the price of the article may be low-
" ered. It is in the power of the combination to raise
" it, and the result in any event is unfortunate for the
" country by depriving it of the services of a large
" number of small but independent dealers who were
" familiar with the business and who had spent their
" lives in it, and who supported themselves and their
" families from the small profits realized therein.
" Whether they be able to find other avenues to earn
" their livelihood is not so material, *because it is not*
" *for the real prosperity of any country that such*

" *changes should occur which result in transferring* " *an independent business man, the head of his estab-* " *lishment, small though it might be, into a mere ser-* " *vant or agent of a corporation for selling the com-* " *modities which he once manufactured or dealt in,* " *having no voice in shaping the business policy of* " *the company and bound to obey orders issued by* " *others.* Nor is it for the substantial interests of the " country that any one commodity should be within " the sole power and subject to the sole will of one " powerful combination of capital. Congress has, so " far as its jurisdiction extends, prohibited all con- " tracts or combinations in the form of trusts entered " into for the purpose of restraining trade and com- " merce."

And again in *Addystone Pipe and Steel Co.* vs. *United States* (175 U. S., 211, 244), this Court again recognize that such is the object and purpose of the Act: "We have no doubt that where the direct and " immediate effect of a contract or combination " among particular dealers in a commodity is to de- " stroy competition between them and others, so that " the parties to the contract or combination may ob- " tain increased prices for themselves, such contract " or combination amounts to a restraint of trade in " the commodity, even though contracts to buy such " commodity at the enhanced price are continually " being made. Total suppression of the trade in the " commodity is not necessary in order to render the

" combination one in restraint of trade. It is the " effect of the combination in limiting and restrain- " ing the right of each of the members to transact " business in the ordinary way, as well as its effect " upon the volume or extent of the dealing in the " commodity, that is regarded. All the facts and cir- " cumstances are, however, to be considered in order " to determine the fundamental question—whether " the necessary effect of the combination is to restrain " interstate commerce."

Such, then, being a general statement of the economic purpose of the Act, we must consider more particularly within what limits it operates, for the power of Congress being constitutionally restricted, that body cannot apply the remedy to all evils engendered by similar causes, but only to those arising from causes within its special supervision. And, therefore, the operation of the Act is confined to such combinations only as restrain or tend to monopolize interstate commerce over which Congress is given supervision by the Constitution.

What is interstate trade and commerce? The meaning of the terms as used in this Act have been definitely explained by this Court. In *United States* vs. *E. C. Knight Co.* (156 U. S., 1, 13), it is said: " Contracts to buy, sell or exchange, goods to be " transported among the several States, the transpor- " tation and its instrumentalities, and articles bought, " sold or exchanged for the purposes of such transit

"among the States, or put in the way of transit, may "be regulated, but this is because they form a part of "interstate trade or commerce."

And, again, in *Addystone Pipe and Steel Co.* vs. *United States* (175 U. S., 211, 241), this Court say: "As has frequently been said, interstate commerce "consists of intercourse and traffic between the citi- "zens or inhabitants of different States, and includes "not only the transportation of persons and property "and the navigation of public waters for that pur- "pose, but also the purchase, sale and exchange of "commodities. * * * If, therefore, an agree- "ment or combination directly restrains not alone the "manufacturer, but the purchase, sale or exchange of "the manufactured commodity among the several "States, it is brought within the provisions of the "statute. The power to regulate such commerce, "that is the power to prescribe the rules by which it "shall be governed is vested in Congress, and when "Congress has enacted a statute such as the one in "question, any agreement or combination, which di- "rectly operates, not alone upon the manufacture, "but upon the sale, transportation and delivery of an "article of interstate commerce, by preventing or "restricting its sale, etc., thereby regulates interstate "commerce to that extent and to the same extent "trenches upon the power of the National Legisla- "ture and violates the statute."

And in *Hopkins* vs. *United States* (171 U. S., 578, 597) it is said:

"Definitions as to what constitutes interstate com-
" merce are not easily given so that they shall clearly
" define the full meaning of the term. We know
" from the cases decided in this Court that it is a
" term of very large significance. It comprehends,
" as it is said, intercourse for the purposes of trade in
" any and all its forms, including transportation, pur-
" chase, sale, and exchange of commodities between
" the citizens of different States, and the power to
" regulate it embraces all the instruments by which
" such commerce may be conducted."

Do these decisions, which have thus thoroughly and exhaustively eludicated and explained the Act, constitute the law of the case at bar?

First, we will consider the object of the combination. Is it a subject of interstate trade and commerce?

Secondly, we will consider the constitution and by-laws of the Association, which evidence the agreement between the combined associates. Do they constitute a contract in restraint of trade?

Thirdly, we will consider the acts of the associates in pursuance of the agreement. Do they show a consideration in restraint of trade and commerce or a monopolization thereof?

The object of the combination is to regulate the

distribution of tile from the producers and manufacturers without the State, into the hands of the dealers and tile-setters within the State. The resident and local parties to the agreement purchase from the manufacturers, acts which constitute "purchase, sale, " and exchange of commodities between the citizens " of different States."

The constitution and by-laws of the Association evidence an agreement to regulate and restrain this commerce, first by diverting the subject thereof from those to whom free, unfettered and natural competition and normal trade laws would bring it, and secondly by fixing an unnatural and arbitrary price to dealers not members of the Association.

The preamble of the constitution of the Association recites that "The objects for which this Associa- " tion is formed are: To unite all *acceptable* deal- " ers in tiles, fire-place fixtures and mantels in San " Francisco and vicinity (within a radius of two hun- " dred miles), and *all American manufacturers* of " tiles." (Trans., p. 47.)

It will be seen that only *acceptable* dealers are eligible for membership and to the benefits of trade with the manufacturers. But who are acceptable? And to whom? The article on membership provides that "Any individual, corporation, or firm engaged " or contemplating engaging in the tile, mantel, and " grate business * * (not manufacturers), *hav-*

" *ing an established business and carrying not less* " *than $3,000 worth of stock, and having been pro-* " *posed by a member in good standing and elected,* " *shall, after having signed the constitution and by-* " *laws governing said association, and upon the pay-* " *ment of an entrance fee,* as hereinafter provided, " enjoy all the privileges of membership." And Section 8 of Article III of the by-laws (Trans., p. 52) provides that: "Manufacturers of tile or fireplace " fixtures, or resident or traveling agents of manu- " facturers *selling or disposing, directly or indirectly,* " *their products or wares to any person or persons* " *not members of the Tile, Mantel and Grate Asso-* " *ciation of California shall forfeit their member-* " *ship in the association,*" while the preceding section provides that: "No dealer and active member " of this association *shall purchase, directly or indi-* " *rectly, any tile or fireplace fixtures from any manu-* " *facturer or resident or traveling agent of any manu-* " *facturer not a member of this association; neither* " *shall they sell or dispose of, directly or indirectly,* " *any unset tile for less than list prices to any person* " *or persons not a member of this association, under* " *penalty of expulsion from the association.*"

It will be seen that any person desiring to engage in this interstate trade, and purchase tile from a manufacturer, a member of the association, is debarred from that right unless he be *acceptable* to the mem-

bers—that is, he must beg and sue the other dealers for the privilege of engaging in trade, and they may debar him therefrom at their will; he must have an established and prospering business; he must pledge himself to buy from none but this group of manufacturers, and must pay for the privilege. On the other hand, an Eastern manufacturer desiring to extend his sales into San Francisco and vicinity, finds a large part of that market closed to him unless he join the association, and if he join he loses all customers outside the association. Under any circumstances, the natural and normal market, either for the selling manufacturer or the purchasing dealer, is cut in two.

We submit that these provisions constitute a contract in restraint of trade or commerce between the States, and upon their face show clearly that such is the intent of the association.

As was said by his Honor, Judge Gilbert, on writ of error to the Circuit Court of Appeals:

"The local members were bound by the articles of
" the association not to sell goods to non-members
" except at prices which were more than double the
" prices which the members paid and which all deal-
" ers had paid before the association was formed, and
" the manufacturers were bound not to sell to non-
" members at any price or under any conditions.
" The testimony indicated that the defendants in
" error had been in constant competition with the

" San Francisco firms which entered into the associa-
" tion, and had bid against them on contracts for
" work. The formation of the association shut off
" all such competition. The defendants in error
" were powerless to compete with local firms which
" possessed such advantages over them. The neces-
" sary effect of the combination was to crowd out of
" business every local dealer who was not a member
" and thereby to create a monopoly in the hands of
" those who were. It is argued that the defendants
" in error might have joined the association had they
" chosen to do so, and that thereby they might have
" availed themselves of the privileges of member-
" ship. To this, it is sufficient to say that it does not
" appear that they would have been admitted to
" membership if they had applied. Under the by-
" laws, they were not eligible, for the reason that they
" did not at all times carry the requisite amount of
" stock, and if they had possessed the necessary
" amount of stock they had no assurance that they
" were 'acceptable' to the members. On the con-
" trary, the fact that they were not invited to enter
" the combination when it was formed was a distinct
" intimation to them that they were not acceptable.
" But it is immaterial whether they would or would
" not have been admitted into the combination. To
" protect their business and secure their legal rights
" they were not obliged to submit an application for
" membership in such a combination, with the possi-

" bility of its rejection, or to submit themselves to the " rules and exactions of the association. It is clear, " also, that the tendency of the combination was to " prevent others from engaging in the business. No " one could become a member who had not 'an estab- " lished business,' and it is too evident to admit of " denial that no one could establish a business in com- " petition with the members of the association, who " possessed such advantage in dealing with manufac- " turers" (Trans., p. 108).

See, also:

United States vs. *Coal Dealers' Association,* 85 Fed., 252.

But, whatever may have been the intent and object of the association, in the adoption of its constitution and by-laws, the record shows fully, clearly, and convincingly that it did restrain and monopolize trade and commerce between the State of California and other States. Lowry & Daly, prior to the formation of the association, had been purchasing all the tile used by them in their business from the Columbia Encaustic Tile Works of Anderson, Indiana (Trans., p. 54). Upon the 23d day of August, 1898, that corporation wrote to them, in part, as follows: "We " beg to advise you that we have become a member " of the Tile, Mantel and Grate Association of Cali- " fornia. We do not know whether you are members " of the same or not. * * We trust, however, that

"you are members, and if not, we request that you "join the association, if you can see your way clear "to do so. * * We will, of course, complete your "unfinished orders. * * As for the future, as "long as we are members of the association, we will, "of course, be compelled to confine our sales within "the association" (Trans., p. 57).

About August 26th, Lowry & Daly placed an order for tiles with the Columbia Company by telegram, and received a letter acknowledging the order, and continuing as follows: "We wrote you several "days ago about the tile dealers' association. As "stated in that letter, we do not know whether you "are a member or not, but as you have not had time "to receive our letter on the subject, we will book "this order, as we know that you have been buying "of us and are depending upon us. After receipt of "our letter on the subject of the association, we will "not be able to book further orders from you unless "you are members" (Trans., p. 58).

August 31st, Lowry & Daly sent in a further order, which was acknowledged and entered by the Columbia Company. September 1st, the Company wrote, referring to this last order: "We have looked this "matter up, and find that you have had time to re- "ceive our letter of the 23d inst. in regard to associa- "tion matters, and, as stated in that letter, we cannot "book any more orders from you after you have re- "ceived our letter of the 23d, unless you are mem-

"bers of the association," and telegraphed on September 22d: "We decline to book your orders after "August 28th, including car-load as written you "August 23d" (Trans., p. 59).

On September 17th, Clarke, the broker whom Lowry & Daly employed to secure tile from other manufacturers, if possible, wrote to the Cambridge Tile Manufacturing Company, of Covington, Kentucky, as follows: "It is possible that you are mem- "bers of the association. If you are not members, "are you free to sell dealers who are not members of "the association? I could place two car-load orders "at once with old customers of mine." He received the following reply: "We are members of the Cali- "fornia Mantel, Tile and Grate Association, and "are not free to sell to parties who are not members "of this association" (Trans., p. 62).

September 28th, he wrote to the United States Encaustic Tile Company, of Indianapolis, Indiana:

"Not knowing whether or not that you are members "of said association, I kindly ask if you are so situ- "ated that you can sell dealers who are not members "of the association? I have some old customers, and "good ones, too, not in the association. They would "place an order for two cars at once;" and received the following reply: "We are at this time members "of the association mentioned, and therefore feel

"that we should protect our regular customers" (Trans., p. 63).

September 17th, he wrote to the Star Encaustic Tile Company, of Pittsburg, Pennsylvania: "One "of my old customers, not a member of the associa- "tion, is in the market for a carload of floor tile. If "you are situated so that you can do business with "the people I refer to, I would be pleased to have "you notify me to that effect," receiving the following reply: "We beg to say our goods are handled "in your city by W. W. Montague & Co., Bush & "Mallet Co., and Bennett & Schutte, to any of whom "we beg to refer you for anything in the way of "encaustic tile you may desire" (Trans., p. 64).

The record also contains the express admission of counsel for these plaintiffs in error that the manufacturers who were members of the association would not do business with non-members (Trans., p. 60).

It clearly appears that the refusal of the manufacturers to sell and ship their goods to defendants in error *was solely by reason of the fact that they belonged to the association and defendants in error did not.* If this be not a restraint of commerce between the States, we cannot comprehend the meaning of the term, nor the definition which this Court has given it.

But this combination not only restrained, but monopolized interstate trade and commerce, placing the entire control of tile shipped from outside the

State of California by the associated manufacturers into the City of San Francisco and its vicinity in the hands of certain preferred dealers, members of the association.

As was said by this Court in *United States* vs. *E. C. Knight Co.* (150 U. S., 1-16):

"In order to vitiate a contract or combination, it "is not essential that its result should be a complete "monopoly; it is sufficient if it really tends to that "end and to deprive the public of the advantages "which flow from free competition."

The associated manufacturers refused to sell at any price or under any conditions to persons who were not members of their association, and the members could keep out any one they chose, thus placing in the power of the members to say who should and who should not purchase such commodities; who should and who should not act as jobbers and tile setters. The full power to control the membership being confided to the resident members, and following therefrom the right to limit the persons to whom the merchandise should be sold, a full and complete monopoly of the output of the associated factories within this territory was given to the local dealers, in unset as well as in set tile.

Lowry & Daly were engaged in the business of selling tile set in the walls and floors of buildings, and also unset tile. They were constantly entering

into competition with the dealers who became members of this association. Mr. Lowry testified (Trans., p. 54): "In bidding for work, I figured against "Montague & Co., Bush & Mallett, Mangrum & "Otter, Bennett & Schutte, Thomas Rigney, and *all* "of those who are in our complaint. I came in com- "petition with them on nearly every job I figured on, "one or the other."

And these very competitors entered into a combination with the manufacturers, and Lowry & Daly could obtain no tile. Their competition was eliminated. The resident members having monopolized the output of the factories, monopolized the trade in tile, and monopolized the contracts for setting the same. Not only was this firm excluded by the monopoly, but all other local dealers and contractors who were not members of the association.

And this monopoly, so formed by the association, had the effect toward which all monopolies tend; it arbitrarily fixed and raised prices to the consumer upon commodities in use by the public. It fixed an arbitrary list price at which tile should be sold to the public. It will be remembered that Lowry & Daly were contracting tile setters. In order to fulfill their contracts, it was necessary for them to go into the market and procure tile to be used in their contract jobs. They were, therefore, purchasers and consumers, and being non-members of the association, they, and all others in like position, were the public in

their relation thereto. Plaintiffs in error in the Court below attempted to make a distinction between set and unset tile, but the tile sold to dealers and contractors such as Lowry & Daly is unset tile, and if they did not belong to the association they were compelled to pay the list price, which was more than double the regular price—that is, the list price less discounts—to like dealers and contractors who were members.

The evidence of Mr. Webster (Trans., pp. 47, 71-75), the secretary and treasurer of the association, is instructive upon this question: "The manufac- "turers pack the tile in barrels and ship it to the deal- "ers as material to construct something of—to build "on the walls or complete some work with. Until it "is so used it is called unset tile. By the expression, "'unset tile,' we mean tile as a commodity, which has "not been put in the place where it is designed to be "used, just the same as brick, before it forms part of "a building, or cloth before it was made into clothes. "The commerce or trade between the manufacturers "in the East and the dealers in San Francisco is in "unset tile. Unset tile is very seldom sold to a con- "sumer in this market." (In passing, it will be noted that by "consumer" the witness means the *ultimate consumer,* not the contracting tile setter purchasing material for use in the contract job). "At the time "the Tile, Mantel and Grate Association of Califor- "nia was formed, the dealers in California were buy-

" ing unset tile from the manufacturers, and the tile " traded in between the dealers and the consumers in " California was set tile placed in the building com- " plete."

In reply to the question, "What does the term " mean, 'list prices,' as applied to unset tile?" he said: " It would apply to any list that the association might " adopt, at which they would sell unset tile to parties " not members of the association, or members of the " association, if you will, as well. The expression, " 'fifty, ten, five and five off for cash,' means a " discount off the list which they have issued. " To illustrate: If the Columbia Encaustic " Tile Company had a list, for example, tile, " $100 per barrel, a barrel of such tile sold " to you would cost you $100, 50 per cent " off, then 10 per cent. off that, and 5 per cent. off " further, and if you paid cash an additional 5 per " cent. off. The original price at which the manu- " facturer in the East sells his goods, and from which " the discounts are taken, is the list price. *At the* " *time of the formation of the association, this list* " *price was not of a constant and uniform quantity;* " *that is, the same quantity or same discount for each* " *manufacturer. There was a variance in the price-* " *list among the manufacturers.* The list price above " referred to is not the list price that is referred to in " Section 7 of the by-laws—that section refers to our " list price. *We adopted that list price at the time of*

"the formation of the by-laws, and in doing so, with "some changes, we adopted the list price of the "American Encaustic Tile Company."

We cannot conceive of any statement which would more conclusively show an arbitrary and conventional fixing of prices by a monopoly. Before the combination, the various independent manufacturers had different list prices and different discounts. Afterwards, to the public—that is, to non-members—a uniform, standard, and abnormal price was fixed, at which alone the non-associated consumer could procure the goods produced by *any* associated factory.

And, again, he said (Trans., p. 74): "The associ- "ation was formed for the benefit of all the tile deal- "ers, it being our expectation to have them all join. *"We had a provision in our by-laws to try and force "people to join the association—that is, if they were "not able to buy tile from other factories, they would "then come into the association with us.* The idea "was, if they could not get tile from other factories, "that provision would bring them in with us."

This testimony needs no comment. The record discloses the existence of every evil which the act was designed to correct. The local dealer and contractor is offered the choice of going out of business or merging his individuality in an association not subject to his control and sacrificing his independence thereto. The purchasing contractor and the selling manufacturer find the buying and selling market cut in two.

To the mediate consumer—that is, the contractor—prices are arbitrarily fixed and advanced, and to the ultimate consumer—the general public—prices are raised, through the death-blow struck at competition among the tile-setters by the monopolization of the factories' products.

Counsel for plaintiffs in error urge that the facts herein make a case within the rules in *Hopkins* vs. *United States* (171 U. S., 578), and *Anderson* vs. *United States* (171 U. S., 604). But we submit that there is no parallel between the facts in those cases and that at bar. In the *Hopkins* case, a number of live stock commission merchants doing business in Kansas City formed a voluntary association known as the Kansas City Live Stock Exchange. The business of the members of the exchange was to receive, individually, consignments of live stock from the owners of the same, residing both within and without the State of the place of business of the exchange; to feed the stock; to prepare it for market; to dispose of it; to receive the proceeds of the sale thereof from the purchasers; and to pay the owners their proportion, after deducting charges, expenses and advances. But the stock-raisers and owners were not parties to the association. The association did not regulate or restrain the distribution of the stock from producer to consumer, it simply regulated the dealings of the commission merchants in relation to the live stock

after it had come into their hands, and had ceased to be a subject of interstate commerce. The associates were not bound to deal with any certain body of stock-raisers, nor were any stock-raisers bound to deal exclusively with the associates. And this Court said: "The right of the owners themselves to sell "their own cattle is not affected or touched by the "agreement in question, while the privilege of hav- "ing their cattle sold for them at the market place, "frequented by defendants, and with the aid of one "of them is a privilege which they are charged for, "and which is not annexed to their right to sell their "own cattle. * * * In all the cases which have "come to this Court there is not one which has de- "nied the distinction between a regulation which di- "rectly affects and embarrasses interstate trade or "commerce, and one which is nothing more than a "charge for a local facility provided for the transac- "tion of such commerce. On the contrary, the cases "already cited show the existence of the distinction "and the validity of a charge for the use of the "facility."

In the *Anderson* case, the yard traders in the Kansas City stock yards formed an association similar to that in the *Hopkins* case, called the Traders' Live Stock Exchange, the distinction between the two exchanges being that in the *Hopkins* case the members sold consigned cattle on commission; in the *Anderson* case the members were purchasers of cattle in

the market. No attempt was made to monopolize the trade or to raise or lower prices by the combination, and it was held not to be a restraint of trade, this Court, therefore, not deciding whether the members of the exchange were engaged in interstate trade.

Counsel also urge that in transactions between the dealers and manufacturers that the association fixes no tariffs or prices, and that the association itself does no business. While perhaps it might be—although not disclosed by the record—that the associated manufacturers fix no prices for the associated dealers, yet the association does fix prices for non-associated dealers, and the associated dealers are unable to take advantage of lower prices offered by non-associated manufacturers—if such there be—for they are pledged not to buy from them. The statement that the association itself does no business is not accurate. As an association it does not buy and sell, but it controls and regulates the business of the associates. It is not essential that a combination of individuals should engage in their collective capacity in trade in order to restrain trade. If the dealings of the individuals are regulated by a common agreement, and are transacted within certain defined limitations, a restraint of trade is effected.

Counsel contend that since it is lawful for an individual to trade or decline to trade with another individual, or class of individuals, that several may agree jointly to do so and may so declare their in-

tention. We submit that this was not the rule at common law. For even if an association or corporation might decline to trade with an individual or class, yet several individuals could not combine and conspire with the set intent and purpose of their combination to shut another individual out of the market. Such a conspiracy is enjoinable in equity; such a combination is void at common law.

And far more stringent and severe is the enacted law of Congress. To so argue is to defy and set at naught the plain meaning of the Act. For any combination of which the avowed purpose is to exclude an intending and ready purchaser from the buying market,—or such portion of that market as was formerly furnished by the manufacturers thus associated together—is in restraint of trade, and all the power of words and magic of sophistry cannot avail to make it otherwise.

"*Every* contract, combination in the form of "trust or otherwise, or conspiracy, in restraint of "trade or commerce * * * is hereby declared "illegal," says the statute, and "*every* person who "shall monopolize, or *attempts* to monopolize, or "*conspire with any other person or persons* to "monopolize any part of the trade or commerce "* * * shall be deemed guilty of a misde-"meanor."

The life and vitality of that Act cannot be sapped by such specious reasoning and falsely premised ar-

gument. The right of combination which counsel asserts, is the very evil which the Act is intended to remedy; it is the very thing which Congress has said shall not be done.

And again counsel urge that it is only trade in unset tile that is restrained, and that since there was practically no interstate trade in unset tile, that the restraint is a negligible quantity; that the practical effect of the combination to restrain such interstate trade is so trifling and inconsiderable, as not to call for relief. And as the basis of this argument the testimony of Mr. Mangrum, a local dealer, is quoted (Trans., p. 77): "I should think that one per cent "would be a very conservative estimate" of the unset tile sold by the dealers, etc. But as we have already pointed out this and similar testimony refers to sales to ultimate, not mediate consumers. Sales were made to non-associated dealers of unset tile; they were debarred from the Eastern market for purchasing that commodity and were forced to buy it from the associated dealers, and after the association was formed Lowry & Daly were compelled to purchase all the tile needed to enable them to fulfil their contracts from such dealers. Assuredly the means of livelihood of a prosperous and active firm of contractors is neither an insignificant, nor a negligible quantity.

The Circuit Court erred neither in awarding counsel fees, nor in the amount of the fee awarded.

The Act provides: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor * * * and shall recover threefold the damages by him sustained, and costs of suit, including a reasonable attorney's fee."

Counsel in their brief measure the value of the services of the attorney by the amount of judgment recovered. While they admit that two witnesses testified to the amount, and that the Court was fully qualified to pass upon the question, yet claim that because the verdict of the jury was for five hundred dollars, the attorney fee should have been less, how much less he does not state. We submit that the Court below being fully cognizant of the services rendered, was competent to pass upon the amount of the fee.

It is not contended or claimed that services rendered in the trial of the cause which occupied five days' actual trial in Court (Trans., p. 87) were not of the value charged and allowed by the Court to the plaintiffs in the Court below. But the only contention is that the verdict being for five hundred dollars damages, the fee is excessive. We submit that

such is not the proper measure of the value of the services of attorneys in such cases.

The damages were but incidental to the wrong suffered by the plaintiffs in the Court below. The main object of the action was to have declared illegal this combination that was sapping the life out of their business, and threatening them with ruin and destruction, and when that was accomplished, they had done in a great measure what was intended, and the damages were but an incident to the wrong. But a suit for damages is the only method prescribed under the Act wherein a private individual can obtain redress.

We submit that this case is similar in character to suits for infringements of patents, and other cases wherein attorney's fees are allowed. In those cases the amount of damages recovered do not prescribe the amount that should be allowed for attorney's fees.

The rule contended for by plaintiffs in error is such a one as might guide a Court in allowing a fee for the collection of a promissory note. But not in cases of this character. We insist that such allowance was reasonable and proper, and should not be disturbed.

We respectfully submit that for the reasons herein given, the judgment of the Circuit Court be affirmed with costs, and an attorney's fee for services in this Court.

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